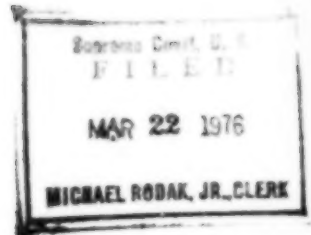


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IN THE
SUPREME COURT OF THE UNITED STATES

75-6067

RN

LAWRENCE WATTS,
Petitioner

Vs.

STATE OF LOUISIANA
Respondent

OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

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FACTS

Lawrence G. Watts was convicted of the crime of Aggravated Rape on July 9, 1975 in the Sixteenth Judicial District Court, Parish of St. Mary, State of Louisiana. He was sentenced to death as required by Louisiana law.

The defendant appealed his conviction to the Louisiana State Supreme Court and that Honorable Court affirmed the conviction October 1, 1975; rehearing refused, October 31, 1975. The opinion of the Louisiana State Supreme Court is reported at 320 So.2nd 146 (1975), a copy of which is attached hereto as Appendix A.

The defendant now applies for writs to the United States Supreme Court for its decision on three issues of law.

ISSUES

1. Whether the imposition and carrying out of the sentence of death for the crime of aggravated rape under the law of Louisiana violates the Eighth or Fourteenth Amendment to the Constitution of the United States.
2. Whether the failure of petitioner's trial counsel to object to the exclusion for cause of veniremen with equivocal scruples against capital punishment, in possible violation of the Sixth and Fourteen Amendments, constituted a waiver of the said question for the purpose of appellate review.
3. Whether the exclusion for cause of two veniremen on the grounds of their expressed attitudes toward the death penalty violated petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States.

LAW AND ARGUMENT

I.

WHETHER THE IMPOSITION AND CARRYING OUT OF THE DEATH PENALTY FOR AGGRAVATED RAPE UNDER EXISTING LOUISIANA LAW VIOLATES EITHER THE FOURTEENTH OR THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

Petitioner urges that Writs of Certiorari be granted in order that the Court might consider what are allegedly violations of the rule set forth in Furman v. Georgia, 408 U.S. 313, to wit:

1) That the District Attorney's discretion regarding whether or not to prosecute, and similar discretion as to the charge, are unconstitutional in capital cases, as they encourage discrimination in contravention of the Equal Protection Clause of the Fourteenth Amendment.

2) That the discretionary power of the Governor of the State of Louisiana is unconstitutional for the same reasons.

3) That plea bargaining as practiced in Louisiana is unconstitutional for the same reasons.

4) That because the jury may return any of a number of verdicts, none carrying a death penalty, as responsive to a charge of aggravated rape, juries in Louisiana in reality retain the same degree of discretion in sentencing which was condemned in Furman v. Georgia, supra, in spite of the fact that the death penalty is statutorily mandated upon a finding of guilty of aggravated rape. Additionally, petitioner urges that the imposition of the death penalty in this case is a cruel and unusual punishment as contemplated by the Eighth Amendment to the United States Constitution.

The State of Louisiana contends that none of the petitioner's allegations raise a question of violations of the United States Constitution sufficient to move this Court to grant certiorari for their review.

The central issues of imposition of the death penalty for a conviction for aggravated rape were properly briefed and ruled upon by the Supreme Court of Louisiana in its decision below.

The system in capital cases was amended by the Louisiana Legislature following this Court's ruling in Furman v. Georgia, supra, to follow the guidelines set forth therein. Presently, the only body which proscribes the penalty of death when one is convicted of certain enumerated crimes in Louisiana, is the Louisiana Legislature. The Louisiana Legislature has taken the power to proscribe the death penalty for those convicted of capital crimes out of the hands of the judge and jury.

This was pointed out by the State of Louisiana in its original brief to the Louisiana Supreme Court in the State v. Selman, 300 So.2d 467, at page five in the following language.

"Defendant reserved Bill of Exception No. 6 because of the Court's imposition of the sentence of death.

In State v. Myers, 261 La. 100, 259, So.2d 27 (1972) a case decided by the Supreme Court of Louisiana on February 21, 1972, rehearing denied on March 27, 1972, this Court upheld the death penalty for aggravated rape, although the victim's life was neither taken nor endangered. The Court held that such a penalty did not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. The case upheld a long line of decisions by our Supreme Court.

In June of 1972, the United States Supreme Court handed down its decision in Furman v. Georgia, 92 S.Ct. 2726, 408 U.S. 245 (1972). The United States Supreme Court decision was adopted by an extremely divided court in which all nine Justices wrote separate opinions. Five Justices concurred in the decision and four Justices dissented. Each of the five Justices in the majority based his decision on a different rationale. The State of Louisiana urges that a proper interpretation of Furman v. Georgia, supra, does not hold that the death penalty itself is unconstitutional. The proper interpretation of Furman is that the legislature may not vest the decision of whether or not to proscribe the death penalty solely in the judge or jury. Once the jury has determined that the defendant is guilty, that is, that the defendant has perpetrated acts which constitute the elements of the crime, then they should not be allowed to further determine whether the defendant should receive the death penalty or a prison sentence. The reason

behind this is that such a procedure allows the jury to arbitrarily decide the defendant's fate, not on the basis of law, but by considering other factors such as racial, social standing, and other individual factors. A sentencing provision which encompasses such a system allowing a jury to arbitrarily and, perhaps, discriminatorily proscribe death would constitute cruel and unusual punishment. The majority of the decisions by the Justices contained no language to the effect that the death penalty would be unconstitutional if the crime so punished did not involve actual physical beating or grave bodily harm. Such a decision would throw justice into an 'eye for an eye' rationale. A reading of the various opinions indicates that a majority of the Justices accept the proposition that the imposition of the death penalty for a crime is a legislative function, but that it cannot be delegated to the jury for an arbitrary decision. Further, that aggravated rape is such a heinous crime that the death penalty would not be excessive in itself, if applied to such a crime. In light of this, the Louisiana Legislature met in 1973 and amended their own delegation of the death penalty from the jury in capital cases. The penalty provision for aggravated rape, LSA-R.S. 14:42, still reads as follows: 'Whoever commits the crime of aggravated rape shall be punished by death.' (Emphasis added.) However, in order to take the final decision out of the hands of the jury, the legislature amended our Code of Criminal Procedure, Article 814, the responsive verdict article, to remove the verdict or 'guilty without capital punishment.' The legislature has spoken and if the jury, as finders of fact, determines that the elements of aggravated rape are proved and the defendant guilty, then the punishment shall be death. A determination that the sentence of death for the offense of rape would be cruel and unusual punishment, per, se, under the Eighth Amendment of the United States Constitution would thwart the legislative will, something that the majority of the Justices of the United States Supreme Court indicate they were not willing to do. The State submits that the constitutional objections struck down in Furman v. Georgia, supra, have now been corrected by the Louisiana Legislature. This crime occurred after the amendments to our criminal laws correcting the deficiencies in our imposition of the death penalty and the jury found the defendant guilty of aggravated rape. There was no discretion in the sentence. Once found guilty, the death penalty must be applied. It is submitted that the law, as established by this Court in State v. Myers, supra, is still valid and the rationale was unaffected by Furman v. Georgia except to the extent of the procedural deficiencies discussed above, which have now been corrected by our legislature."

The State of Louisiana feels that with regard to petitioner's first three arguments as enumerated above, the Court has little reason to grant certiorari. It is incumbent upon any system of government that certain officials therein must make decisions. The making of these decisions requires as a matter of course the use of sound discretion. To accept the thrust of petitioner's first three

arguments would be to remove an element necessary to the smooth functioning of the governmental processes. The exercise of sound discretion and the holding of a position of responsibility are complementary.

Thus, these arguments are not confined to capital cases but are involved in all criminal prosecutions at both the federal and state levels. The prosecutor's discretion is a necessary part of the criminal justice system, which is recognized and approved at both the federal and state levels. The prosecutor does not convict or sentence, juries convict and, in capital cases, the legislature proscribes the sentence of death. The thrust of Furman is that once a jury has found the defendant guilty of a capital offense, the jury or judge should not then be left with the question of whether that defendant will be sentenced to death or not.

It is fundamental law that a grand jury indictment is not evidence of guilt at the subsequent trial. As a further qualification of the prosecutor's power in capital cases brought in Louisiana, our Code of Criminal Procedure provides in Article 382:

"Art. 382. Methods of Instituting criminal prosecutions

A prosecution for an offense punishable by death, or for an offense punishable by life imprisonment, shall be instituted by indictment by a grand jury. Other criminal prosecutions in a district court shall be instituted by indictment or by information..."

Therefore, in Louisiana in a capital case there must be a grand jury indictment whereby all other prosecutions may be instituted by a Bill of Information.

The prosecutor's discretion in seeking a grand jury indictment in a capital case or his discretion in plea bargaining is clearly not unconstitutional, but additionally is outside the time frame and circumstances at which Furman was directed. He is not involved in the jury's deliberation of guilt or innocence and, once a verdict of guilty is found, he is powerless to prevent the imposition of the death penalty. Furman was aimed at the time when a

defendant was found guilty of an offense and at that point whether he lived or died might be determined by his station in life and its impression on the judge or jury when determining sentence. For these reasons, the State feels these questions should not be considered.

The executive clemency argument is additionally an attack on a process long recognized and established for the President of the United States and the chief executives of the various state governments. Such powers are within the executive branch of government and outside of the judicial processes of determining guilt or innocence or imposition of sentence. This argument presents no question which should be reviewed, particularly with no showing that the Governor's Office has ever acted in a discriminatory manner in exercising this traditional power.

Since the 1973 decision of Furman v. Georgia, many states had to amend their capital punishment statutes to comply with that mandate. These amended statutes are just now reaching the various state supreme courts. The courts are rendering decisions that follow the supreme court decision as they interpret the opinions. In Coley v. State, 231 Ga. 829, 204 S.E.2d 612 before the Georgia Supreme Court, it was noted that:

"...it is not discretion per se which must be condemned, but it is unguided discretion that does not 'produce even-handed justice.'" 231 Ga. p. 834, 204 S.E.2d p. 616. (Emphasis added.)

Also in that same case the Court added,

"...that the Act permits the imposition of the death penalty controlled by clear and objective standards so as to produce non-discriminatory application. 231 Ga. 834, 204 S.E.2d 612."

In a 1974 case, State v. Jarrette, 202 S.E.2d 721, the North Carolina Supreme Court reason at page 740:

"...we now reaffirm that decision and hold that the meaning of G.S. §14-17, G.S. §14-21, G.S. §14-52, and G.S. §14-58, in the light of the decision of the Supreme Court of the United States in Furman v. Georgia, supra, is that a defendant, lawfully convicted of first degree murder, rape, first degree burglary or arson, the offense having been committed after 18 January 1973, must be sentenced to death, the trial judge having no discretion in the matter of the sentence to be imposed and the jury having no authority to fix a different punishment." (Emphasis added.)

Petitioner's main argument concerns the system of responsive verdicts used in Louisiana, enacted in response to this Court's holding in Furman v. Georgia, 408 U.S. 313. To a charge of aggravated rape, a jury in Louisiana may return responsive verdicts of guilty of attempted aggravated rape, guilty of simple rape, or not guilty. La. C.Cr.P. Art. 814. None of the responsive verdicts carries the death penalty, as does the crime of aggravated rape. Petitioner contends that under this system, a jury may, in a moment of compassion, return a responsive verdict against a defendant who is, in fact and under the law, guilty of aggravated rape, which carries a mandatory death penalty. Petitioner extends this highly speculative assertion to support the proposition that under the guise of a constitutionally sound, responsive verdict system, lurks yet another vehicle of invidious discrimination which allows arbitrary and selective imposition of the death penalty by juries. It is, according to petitioner, highly susceptible to utilization as a means to bestow mercy upon a fortunate few.

The State of Louisiana feels that petitioner's argument is adequately answered by State law. Therefore, it is not necessary that the case be considered in this Court. The jury, in Louisiana, is entrusted with the responsibility for determining guilt or innocence in all criminal cases. La. Const. Art. XIX, Section 9; La. C.Cr.P. Art. 802. Once the jury determines guilt, the

Court imposes sentence as prescribed by the legislature. La. C.Cr.P. Art. 871. The jury has no discretion whatsoever in determining sentence, the situation condemned in Furman, upon which petitioner relies so heavily.

The North Carolina statute is very similar to the one now in question.

"A murder * * * which shall be committed in the perpetration or attempt to perpetrate any * * * robbery * * * shall be deemed to be murder in the first degree and shall be punished with death: G.S. §14-21 (relating to rape) as so amended, was to the same effect, so far as punishment is concerned." (Emphasis added.)

In State v. Rhodes, 524 P.2d 1095 (1974), the Supreme Court of the State of Montana recorded its interpretation of Furman v. Georgia.

"Furman holds unconstitutional every death sentence imposed pursuant to a statutory scheme that allows the sentencer discretion whether or not to impose the death penalty upon conviction." (Emphasis added.)

The ramifications of this attack on the responsive verdict system are not difficult to imagine: the rational extension of the argument commands that jurors be amenable to examination by the Court and be held accountable for the reasons which prompted them to render the verdict which they did. If any juror expresses any degree of compassion for a defendant, the verdict must be overturned. It is submitted that, if allowed, petitioner's argument would effectively initiate the erosion of a right expressly guaranteed in the Constitution; the right to a trial by jury.

It is submitted that, in order for the constitutional guarantee of a trial by jury to be effective, jurors cannot be held accountable for the reasons which prompt them to vote as they do. Petitioner's argument requires this. In Louisiana, jurors take an oath to try the case in a just and impartial manner, and

to render a verdict according to the law and the evidence. La. C.Cr.P. Art. 790. Barring obvious misconduct by a juror, the State feels that the verdict should not be inquired into, as it is manifest that such inquiry is constitutionally impermissible.

It is the jury's province, in the State of Louisiana, to apply the law as charged them by the judge to the evidence presented at the trial. Whether they return a verdict of guilty to a responsive charge is a matter of law depending upon the evidence adduced at trial. Whether they disregard the law is a matter of jury nullification. Such an argument could just as easily be advanced where the jury returns a not guilty verdict. To uphold this "philosophy" would be to say the jury system itself is unconstitutional.

The State of Louisiana submits that its system of imposing capital punishment is now constitutionally permissible in that the Legislature imposes the death penalty for certain heinous offenses without delegating this authority to the judge or jury.

II.

2. Whether the failure of petitioner's trial counsel to object to the exclusion for cause of veniremen with equivocal scruples against capital punishment, in possible violation of the Sixth and Fourteen Amendments, constituted a waiver or the said question for the purpose of appellate review.

3. Whether the exclusion for cause of two veniremen on the grounds of their expressed attitudes toward the death penalty violated petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States.

For purposes of this presentation, the responses to the above two issues will be combined.

The State of Louisiana asserts that the failure of petitioner's trial counsel to object to the exclusion for cause of veniremen with equivocal scruples against capital punishment is not violative of defendant's Sixth and Fourteenth Amendment rights. Neither does the State of Louisiana agree that petitioner has no appellate remedies. The State of Louisiana does adopt the majority reasoning of the Louisiana State Supreme Court in their appellate review of this issue in 320 S.2 146 at page 153. It is further argued that the veniremen did not have "equivocal scruples" against capital punishment in this particular case, but as will be shown, the veniremen "unequivocally" opposed capital punishment as a penalty in this case.

For the following reasons, the State of Louisiana contends that neither of the above two issues are viable ones.

As to the first of the above two arguments, Louisiana law permits an appeal from plain error. If on the record, the error was so blatant that the defendant was denied due process, then

the Louisiana Supreme Court may exercise its supervisory jurisdiction to overturn the decision. In addition, if the defendant was in any way denied due process, he may appeal to the Federal Courts for error.

It is now argued that the error was not patent on the record. When the trial judge overruled the challenge for cause, he was exercising his discretion after hearing all of the testimony of the prospective jurors. If this was violation of the trial judge's discretion, the Louisiana Supreme Court would have reversed and remanded for a new trial.

I.

Prior to 1968 Article 798 of the Louisiana Code of Criminal procedure provided that:

"It is good cause for challenge on the part of the state, but not on the part of the defendant that:

* * *

(2) The juror tendered in a capital case has conscientious scruples against the infliction of capital punishment."

In 1968 Article 798 of the Louisiana Code of Criminal Procedure was amended to provide that:

"It is good cause for challenge on the part of the state, but not on part of the defendant that:

* * *

(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; or..."

The above quoted language represents an amendment to Article 798 of the Code of Criminal Procedure added by the

Louisiana Legislature in 1968 in response to the United States Supreme Court case of Witherspoon v. Illinois, 391 U.S. 510 (1968). In Witherspoon the United States Supreme Court held it a violation of due process and hence unconstitutional to exclude a juror from a jury in a capital case where the jury decides both guilt and punishment and the juror only states that he has scruples against capital punishment. The court held that in order to be excluded the juror must clearly state that he would vote against the imposition of the death penalty no matter what the trial might reveal. Further, the juror must be specifically questioned about the basis for his objection so that his general objection to capital punishment is made specific. The court specifically held that its ruling was limited in that it did not extend to the issue of guilt but only to punishment. The court stated that:

"The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the state's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them." Witherspoon v. Illinois, 391 U.S. 510 at 513.

In Witherspoon the defendant specifically raised this issue of the effect of a juror's scruples concerning capital punishment on guilt. The court noted that in Witherspoon the Illinois jury had two distinct and separate duties. One was to decide guilt and the other was to decide punishment. On this issue the court stated that:

"It has not been shown that this jury was biased with respect to petitioner's guilt. But it is self-evident that in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendment." Witherspoon v. Illinois, 391 U.S. 510 at 518.

The remedy for a defendant under Witherspoon the court held was not reversal of his conviction, but invalidation of his death sentence.

The Louisiana Supreme Court has followed the United States Supreme Court and invalidated death sentences arrived at in violation of Witherspoon. (State v. Shaffer, 257 So.2d 121, State v. Mejia, 242 So.2d 525, State v. Strong, 236 So.2d 798, State v. Williams, 229 So.2d 706.)

The United States Supreme Court held in Furman v. Georgia, 408 U.S. 238 (1972) that juries could no longer impose the death penalty at their uncontrolled discretion. In reaction to this case the Louisiana Legislature in Act 125 of 1973 Amended Art. 817 of the Louisiana Code of Criminal Procedure and in Act 127 of 1975 amended Article 814 of the Louisiana Code of Criminal Procedure so that in a capital case the jury can no longer qualify its verdict of guilty to read "guilty without capital punishment". In the case of State v. Selman, 300 So.2d 473, the State upheld the constitutionality of the death sentence in a aggravated rape case where the jury did not have the right to qualify their verdict.

In the case at bar the defendant was tried and convicted by a jury which did not have the right to qualify its verdict as did the jury in Witherspoon. Hence, neither Witherspoon and the cases which followed it nor Article 798 (2)(a) of the Louisiana Code of Criminal Procedure dealing with a challenge for cause where the jury has the discretion as to the death penalty, apply to the case at bar. Witherspoon was strictly limited to the single issue of punishment and has not been expanded by either the United States Supreme Court or the Louisiana Supreme Court to guilt. As a result the state argues that the arguments of the defendant based on Witherspoon and found in his supplemental brief do not apply to the facts of the case at bar. Defendant's arguments might have merit if the jury had had the right to qualify its verdict to without

capital punishment. It did not. The jury in the case at bar did not decide the penalty. The penalty in this case was mandatory. All the jury had to decide was the issue of guilt. Therefore, the Witherspoon arguments advanced by the defendant in his supplemental brief simply do not apply to the facts of the case at bar. The question remains, however, of whether the two jurors in the case at bar were properly excluded for cause. The State argues that the two jurors were properly excluded for cause under Article 798 (2)(b) of the Louisiana Code of Criminal Procedure which states that the State may challenge a juror for cause where:

"(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear... (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to defendant's guilt."

In addition, should this Court decide to expand Witherspoon to the issue of guilt as well as punishment, the State argues that the exclusion of the two jurors in the case at bar did not violate the rationale of Witherspoon applied to the issue of guilt.

The defendant alleges that Mr. Gaudet and Mr. Foster were excluded from the jury in violation of due process of law. The defendant complains that when these two jurors were asked about capital punishment and the nature of their beliefs therein that they gave vague answers which were not explored by the State or the trial judge.

MR. GAUDET

The defendant complains that Mr. Gaudet did not make it "unmistakeably clear" that his beliefs concerning capital punishment would keep him from voting guilty. To support this argument the defendant quotes answers similar in nature to those given by Mr. Gaudet in the case at bar from Witherspoon and cases following

Witherspoon. Assuming only for the purpose of argument that this Court will enlarge on Witherspoon and apply its holding to the issue of guilt as well as punishment, the State argues in this case that Mr. Gaudet's answers in this case were sufficient under Article 789 (2)(b) and Witherspoon.

The defendant would have this Court consider Mr. Gaudet's answer out of context. In this brief the defendant quotes language from the trial transcript on the examination of Mr. Gaudet which would lead this Court to believe that Mr. Gaudet was interrogated only by the Court. The trial record shows the contrary. The Assistant District Attorney questioned Mr. Gaudet in detail about his beliefs concerning capital punishment before the court enlarged upon those questions. The Assistant District Attorney asked the defendant:

Q: "Mr. Gaudet did you understand my reading of this definition of rape and aggravated rape?"

A: (Mr. Gaudet) Yes, sir.

Q: Do you know of any reason--Do you have any feelings about that statute--any reason that you would not like to see that statute enforced?

A: (Mr. Gaudet) Well, I really think--I can't see a death penalty for it in one way. I wouldn't actually vote on that.

Q: You say that you could not vote for the death penalty for aggravated rape?

A: (Mr. Gaudet) That's right. I know it's a serious crime.

Q: Is your statement that no matter what the evidence was presented here that you could not vote to convict because of the death penalty?

A: (Mr. Gaudet) I will give you one reason now. It's embarrassing on my part but I say this or not--but I had a brother that was charged at first. Then the charge was reduced later on. The way I felt towards him, I mean I'd like to see him get out even if he would've went to court. Then the charge was later dropped because they found evidence where he exactly wasn't guilty.

Q: For that I reason--

A: (Mr. Gaudet) If I would have to vote, ever since then, it kind of puts doubt in my mind.

Q: Well, can you put aside in your own mind what personal incident may have happened, could you put that out of your mind and listen to this case on the facts that come up here; and if the facts justified it, could you vote for the death penalty?

A: (Mr. Gaudet) Not on rape, I don't think so. No, sir.

BY MR. LEONARD: Your Honor, I would like to enter a challenge for cause." (Transcript, Trial, p. 24-25.)

As the court can see Mr. Gaudet detailed to the trial judge in response to interrogation by the State his reason for not being able to vote for the death penalty for the crime of aggravated rape. The trial court picked up the questioning where the question of the State had stopped and went into the question of guilt. The court stated:

BY THE COURT: "Mr. Gaudet, you understand that the law of this state is such that whoever is proven guilty beyond a reasonable doubt of the commission of the crime of Aggravated Rape, if he is charged with that crime; whoever is proven guilty beyond a reasonable doubt of that crime, the law provides that that person should be put to death. Now, as a juror, you would be called upon to listen to the evidence in the case and to weigh the evidence and if you find that the State through its District Attorney, has proven the defendant's guilt beyond a reasonable doubt of that crime, then to bring in a verdict of guilty. Of course, if you find that they have not proved it, you would likewise be bound to either bring in one of the other verdicts or even a verdict of not guilty. The law would require, in order for you to be able to serve on a jury, that you put aside whatever personal feelings you have and to consider the case strictly on the basis of the evidence which you will hear in the courtroom and the law which I will give you at the conclusion of the trial. If you feel you can do that, you can serve. If you feel that because your own views are of such a strong nature and possibly because of your family involvement in another matter that you cannot do this, then you cannot serve as a juror.

BY MR. GAUDET: That's what I'm afraid of. I know--Like I say, I know it's a serious crime and a man would have to vote -- I'll have to vote guilty and in that case, I mean if it's proven that he had committed the crime, sir.

BY THE COURT: You don't feel that you could put aside those feelings and vote on the basis of the law and the evidence?

BY MR. GAUDET: I don't think so.

BY THE COURT: All right. You are excused. You may go. You are excused finally." (Transcript, Trial, p. 25-27)

The above quote from the record shows that the juror was challengeable for cause under Article 798 (2)(b) or an extension of Witherspoon to guilt. The juror made it clear that since this was a crime for which the only punishment was death his verdict would be affected. In addition this juror was excusable under Article 797 of the Louisiana Code of Criminal Procedure which provides that:

"The State or the defendant may challenge a juror for cause on the grounds that:

(2) The juror is not impartial whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and evidence.

(4) The juror will not accept the law as given to him by the court;"

Also, this juror was excusable under Article 798 (1) of the Louisiana Code of Criminal Procedure which states:

"It is good cause for challenge on the part of the state, but not on the part of the defendant, that: (1) The juror is biased against the enforcement of the statute charged to have been violated or is of the fixed opinion that the statute is invalid or unconstitutional."

A reading of the trial transcript above shows that the juror was biased against the enforcement of the Law of Louisiana on the crime of Aggravated Rape because of a prior involvement his brother had had with the law. In other words it was a combination of the death penalty and the juror's knowledge of his brother's prior involvement with a rape charge that made him impartial. It

should be noted that the defendant through his counsel did not object to the exclusion of this juror nor did he reserve a Bill of Exception as was required by law at the time of the trial. If the defendant had objected the trial judge would have ruled upon his objection and in that ruling stated the reason that he granted the challenge by the State for cause. The interrogation of the juror by the court shows that both the impartiality of the juror and the death penalty objection influenced the decision of the trial judge. In any event the State argues that if the Court decides to extend Witherspoon to the issue of guilt that the exclusion of the juror was proper since he was not impartial under Article 798 (2)(b), Article 797 (2), (4) and Article 798(1).

MR. FOSTER

The defendant also complains that Mr. Foster was improperly excluded by the State for cause. As in Mr. Gaudet's case both the State and the trial judge examined Mr. Foster in detail about the death penalty and the crime of Rape. First the State:

Q: "Did you understand my reading of this statute on rape and aggravated rape?"

A: (Mr. Foster) I understood the statute very well.

Q: Do you have any prejudice or any reason that you would not like to see that statute enforced?

A: (Mr. Foster) Well, my personal reason is, viewing the reason and hearing the reason, I don't think I could give a decision for capital death. I don't believe.

Q: Is it your statement then that no matter what the evidence would show, that if it showed that the defendant was guilty beyond a reasonable doubt, you still could not vote for the death penalty?

A: (Mr. Foster) Not the death penalty on rape.

Q: No matter what evidence would be presented?

A: (Mr. Foster) No, because that crime is so flexible, I don't think I could render a verdict, you know, on the death penalty."

BY MR. LEONARD: "Your Honor, I would challenge for cause." (Transcript, Trial p. 33)

Following this exchange the trial judge explained the law in detail to the juror and asked if he could follow that law. The trial judge stated:

BY THE COURT: "Do you understand that the law provides that whoever is found guilty beyond a reasonable doubt of the commission of the crime of Aggravated Rape shall be put to death. That's what the people of this state have said, acting through their legislators. As a juror, you would be required to listen to the evidence and to accept the law from the court and to decide, if you had found that the defendant had been proven guilty beyond a reasonable doubt of the crime charged, to render a verdict of guilty, which would mean that he would be sentenced to death. Now, could you put aside any personal feelings that you have and accept this as a statement of law and, if you were convinced of his guilt beyond a reasonable doubt, to bring in a verdict of guilty?"

BY MR. FOSTER: "I don't think I could, Your Honor, because I have a family. I would like to listen to the views in the case as such, but I wouldn't be satisfied of being a part of the death penalty." (Transcript, Trial p. 34)

The above quoted language shows that the interrogation of Mr. Foster went far beyond a general inquiry into his beliefs about the death penalty in general. In response to probing questioning by the State and the Court, Mr. Foster explained that although he did not oppose the death penalty per se, in the case of Aggravated Rape he would not vote for the death penalty because in his own words the crime of Rape is "so flexible". The trial judge made it clear to the juror that if he voted guilty the penalty would automatically be death. The juror then clearly stated that he could not vote for guilt in such a case. Clearly this juror could not be neutral and objective in any case involving Aggravated Rape. This juror objected to the crime of Rape as well as the death penalty and hence was challengeable for cause under Article 797 (2), (4), and Article 798 (2), (6) of the Louisiana

Code of Criminal Procedure as well as an extension of Witherspoon to the issue of guilt.

In the case of Frazier v. United States, 69 Sup.Ct. 201, this Court affirmed the position that the trial judge is to have broad discretion in the area of jury examination. In addition, Mares v. United States, 383 F.2d 811 decided that the mere showing of a possible prejudice of a prospective juror will not be sufficient error to warrant a reversal due to the ruling of the trial judge on a challenge for cause.

In summary, the State argues that since the jury did not have the discretion in the case at bar with regards to punishment, Witherspoon, simply does not apply in this case. Also, if this Court decides to extend Witherspoon to the issue of guilt then, on the facts, the State and the judge adequately interrogated the two jurors in this case so that it was clear that the jurors would not under any circumstance, regardless of the evidence, vote for guilt. The State argues that the two jurors were properly dismissed for cause under Article 797 (2), (4) and 798 (2), (6) of the Louisiana Code of Criminal Procedure. Finally, the State argues that the defendant suffered no prejudice, nor was he denied any of his constitutional rights.

CONCLUSION

For all of the above reasons, the State of Louisiana prays that the petition of Lawrence Watts for a Writ of Certiorari be denied.

Respectfully submitted,

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to introduce into evidence "a confession or inculpatory statement" made by defendant. Complaint is made that two confessions were admitted at trial, one confession written and signed in defendant's own hand, and one typewritten and signed by defendant. Defendant contends he relied on the fact that only one confession was to be used at trial. Therefore, he suffered prejudice in the preparation of his defense. We find no merit in this contention.

Upon arrival in Morgan City, defendant made an oral statement relating to the events of the night of the crime. No secretary being available at that time, he wrote the statement out in longhand and signed it. As he was finishing it, the secretary arrived. Defendant then dictated a more detailed statement to the secretary who immediately typed it for his signature. In essence, these two inculpatory statements were the same, the latter being merely a more detailed version.

By way of an application for a bill of particulars, defendant sought information as to whether the state had in its possession any statements made by defendant, either verbal or in writing, which it "intends to use at the trial." The state answered "Yes." Well in advance of trial, defendant also filed a motion foroyer seeking to have the state furnish defendant with "copies of all written confessions and other written statements" made by defendant. Thereafter, a motion to suppress all written confessions was filed and set for hearing. The record of this hearing held on July 12, 1974 (some ten days prior to trial) shows that the state had previously furnished copies of the confessions to defendant in response to the prayer foroyer. During this hearing, the manner in which defendant had executed the two statements was explored in detail.

In view of the state's affirmative response indicating its intent to use at trial statements made by defendant, together with the fact that copies of the two confessions, as well as the details relating to their confession, were in the possession of defendant prior to the time that the state gave notice as required by article 768, we conclude that defendant was not surprised nor prejudiced in the preparation of his defense. Consequently, there is no reversible error.² Assignment of Error No. 3 is without merit.

DECREE

For the reasons assigned, the conviction and sentence are affirmed.



STATE of Louisiana

v.

Lawrence T. WATTS.

No. 56229.

Supreme Court of Louisiana.

Oct. 1, 1975.

Rehearing Denied Oct. 31, 1975.

Defendant was convicted in the 16th Judicial District Court, Parish of St. Mary, Edward A. Delahoussaye, III, J., of aggravated rape and he appealed. The Supreme Court, Calogero, J., held that identification of defendant by victim in front of a store where she had gone to meet the defendant, who had already raped her, pursuant to telephone call which she had received from defendant was not a one-on-one confronta-

2. Technical deficiencies in the notice required by article 768 of the Code of Criminal Procedure do not constitute grounds for reversal unless an accused is surprised or prejudiced thereby. *State v. Hines*, 10, 315 So.2d 372 (1975). See also *State v. Watley*, 361 So.2d 302 (La. 1974); *State v. Normand*, 294 So.2d 625 (La. 1974); *State v. Conley*, 273 So.2d 262 (La. 1973).

tion and was not unduly suggestive as police officers did nothing to indicate to victim which of the many men entering the store might be a suspect; that pair of gloves found during search of defendant's automobile during execution of search warrant was properly admitted notwithstanding the fact that they were not listed in the warrant as things to be seized, and that imposition of the death penalty was not unconstitutional.

Affirmed.

Tate, J., concurred and filed an opinion.

Dixon, J., concurred in part and dissented in part and filed an opinion.

1. Criminal Law C-339

Procedure whereby police officers prevailed upon victim of rape to be at a certain place where attacker had indicated in telephone call, that he wanted her to be so that he could talk to her, whereby police arrested defendant when he approached the victim and was identified by her, and whereby, at defendant's request, the victim was called upon to make the identification in defendant's presence was not an impermissible one-on-one identification but rather was part of an investigation and capture and was not unduly suggestive as the police in no way implied to the victim that the person whom she identified was the rapist.

2. Criminal Law C-412.1(7)

Evidence of statements which defendant made when he called apartment in which he had raped victim was properly admitted into evidence even though the telephone was answered by a policewoman and even though defendant was not given his Miranda warnings before he was permitted to engage in conversation on the telephone with the policewoman, whom he believed to be his victim.

3. Searches and Seizures C-2

Where search warrant was issued and search was conducted before the effective date of the Louisiana Constitution of 1974, its provisions were inapplicable. LSA-Const. 1974, art. 1, § 5.

4. Searches and Seizures C-3.3(4)

Evidence obtained in the proper execution of a restricted search warrant issued on probable cause is admissible notwithstanding the fact that such evidence was not specified in the warrant; validity of such seizure is based on the "plain view" doctrine, which allows seizure of evidence or contraband coming within the officer's view as long as he had prior justification to be in a position to have that view. U. S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

5. Searches and Seizures C-3.3(6)

Where search warrant directed officers to seize \$50 in cash, a piggy bank, and a certain pair of pants and a shirt, and since any of the items could have been hidden under automobile seat, so that police officer was justified in searching that location, pair of gloves which were found during that search were properly seized under the "plain view" doctrine as the police officer had a right to be in the automobile where he located the gloves. U.S. C.A. Const. Amend. 4.

6. Rape C-64

Imposition of death penalty upon defendant convicted of aggravated rape was not unconstitutional despite contention that the jury could have returned a responsive verdict of attempted rape or simple rape, neither of which carried the death penalty. LSA-R.S. 14:42; U.S.C.A. Const. Amend. 8, 14.

7. Criminal Law C-1053

Failure of defendant to receive a bill when two jurors were excused for cause

although they allegedly did not make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to the evidence operated as waiver of the objection. LSA-Cr.P. arts. 841, 920.

8. Criminal Law §1053

Alleged error of trial court in excusing for cause two jurors who did not make it unmistakably clear that they would automatically vote against imposition of capital punishment without regard to the evidence was not an error discoverable by a mere inspection of the pleadings and proceedings and thus not reviewable in the absence of a bill of exceptions. LSA-Cr.P. art. 920(2).

Garland R. Rolling, Metairie, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Knowles M. Tucker, Dist. Atty., Edward M. Leonard, Jr., Walter J. Senette, Jr., Asst. Dist. Attys., for plaintiff-appellee.

CALOGERO, Justice.

On June 6, 1974 defendant was indicted by a grand jury for an aggravated rape, in violation of La.R.S. 14:42, which purportedly occurred on January 16, 1974 in Morgan City. Trial was held on July 8 and 9, 1974 and defendant was found guilty by a twelve man jury. In accord with the provisions of La.R.S. 14:42, defendant was then sentenced to the penalty of death.

Defendant has appealed to this Court, relying on four assignments of error in seeking to have his conviction and sentence reversed. In addition, he contends that selection of the jury was done in a manner violative of the constitutional principles expressed in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and he asks us to consider this alleged error of constitutional magnitude, de-

spite the failure of trial counsel to object during examination and selection of the jury.

FACTS

The victim, a 19 year old girl who was in Morgan City on vacation visiting friends, was alone, asleep in a girl friend's apartment when she was awakened at approximately 10:30 a.m. by the shaking of her bed. A male voice ordered her to shut up, and the intruder placed a butcher knife to her throat, telling her that he would kill her if she did not submit. He then proceeded to rape her twice.

The victim had been ordered to keep her eyes closed, but after the rape was completed, the intruder allowed her to open her eyes and they had a conversation lasting about five minutes. During this time, the victim obtained a good look at the intruder.

The conversation was terminated when one of the victim's friends, a resident of the apartment in which the rape occurred, returned home for lunch. The intruder hid in a closet. The victim went downstairs, admitted her friend, went back upstairs to the bedroom, changed from her night gown to her clothing, and then fled the apartment with her friend. The police were called, but the rapist had escaped by the time the police arrived at the apartment. A broken window screen in a vacant downstairs apartment suggested the means of entry to the dwelling. A note, reading "Meet me tonight out in front of the house at eight" was found on the victim's bed.

During the afternoon, various police officers remained in the apartment investigating the rape. A female police officer was summoned to the apartment after one of the male officers answered a telephone call only to hear the caller hang up without speaking. It was decided that this patrolwoman would answer the telephone thereafter and would impersonate the victim in

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the hope that the caller might be the rapist. She took a call from a person who identified himself as "Roy" and related that he was a friend of "John Smith," the man who had been there that morning. Roy apologized for Smith's behavior, saying that Smith's mind was messed up and that he really was not the way he appeared to be that morning. About two hours later, the patrolwoman answered another call and recognized the voice as that of the same Roy. This time the caller identified himself as John Smith. He again apologized for what had happened that morning and attempted to arrange a meeting for that night so that he could return \$50.00 which he had taken from the apartment. A meeting place was not immediately agreed upon, so the patrolwoman asked him to call again later. A third call was received about 7:30 p.m. and it was then agreed that the meeting would be at 8:00 p.m. at a small convenience store about a block from the apartment.

The victim agreed to cooperate in an attempt at the store to apprehend the rapist. While the police were stationed inside the store, she stood in front waiting for the rapist to approach. She remained there for about thirty minutes, during which time she viewed between fifteen and twenty black males, including approximately six men who matched the general description of defendant, enter the store. When the defendant approached her, she dropped her purse, which was the pre-arranged signal between her and the police. The victim, however, had moved out of the range of vision of the police and she realized that they had probably not seen the signal. After a brief conversation in which defendant suggested they leave in his car, she told defendant she needed to go into the store to buy cigarettes. Once in the store she informed the police that the rapist was standing outside by a telephone booth.

The defendant was then arrested by the police for rape and was informed that he had been identified. He responded by stating "Well, let her tell me that." Thereupon, the victim was summoned over to the defendant by the officer, and she re-affirmed her identification.

After defendant's arrest, search warrants were obtained for his mother's home, in which he resided, and for his mother's automobile, which he had driven to the store. Incriminating physical evidence was found at the home and in the automobile.¹

ASSIGNMENT OF ERROR NO. 1.

Prior to trial, defendant filed a motion to suppress the identification, contending that "a one-on-one" identification procedure was used, and that such a procedure was impermissibly suggestive and conducive to mistaken identification contrary to due process standards enunciated in *United States v. Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967). After a pretrial hearing, the trial court denied the motion to suppress, whereupon defendant objected to the ruling of the court and reserved a bill of exceptions. Defendant assigns the overruling of this motion to suppress the identification as his first assignment of error.

On the hearing on the motion two police officers attested to the facts discussed hereinabove relative to the calls, the stake-out, the identification and the arrest. The trial judge, in denying the motion, concluded that the identification procedure was a reasonable one, not violative of due process, in that the defendant had not yet been arrested and the identification at the pre-arranged meeting was the best way of apprehending him. He pointed out that the only other course available to the police would have been to arrest all persons fitting the description of the rapist who entered the store or came to the store that

1. This recitation of the facts is obviously not complete, but intended to be

night and then display such persons to the victim in a police conducted line up.

Defendant in brief contends that this latter option is exactly what should have been done. He reiterates his contention that the procedure used was an impermissibly suggestive one-on-one identification procedure.

[1] We disagree with defendant's contention and find no merit in this assignment of error. We find that the procedure used in this case was not a one-on-one identification. As that term has been used, it refers to an identification procedure whereby the police, having a suspect in custody, show the suspect and only the suspect to the victim or witness of the crime. This type of custodial showing, with some few exceptions, has been held to be impermissibly suggestive, in that the victim or witness may well be influenced by the fact that the authorities have the individual in custody, perhaps conveying an impression that he is the culprit. See *State v. Newman*, 283 So.2d 756 (La.1973).

Such a concern is not present in the instant case. The defendant was not in police custody. Furthermore, there was nothing about the procedure employed (actually as much a capture as an identification) which in any way can support an argument that it was suggestive. In no way was it suggested or implied to the victim that defendant was the rapist. Her identification was a completely independent one, based solely upon her memory of the rapist.

This assignment has no merit.

ASSIGNMENT OF ERROR NO. 2.

The defendant filed a pretrial motion to suppress taped recordings of the second and third telephone conversations between

the policewoman and the caller who identified himself as "John Smith." Defendant denotes the denial of this motion as assignment of error no. 2.

We note that the tape recordings of the conversation were not played for the jury during trial. The substance of those telephone calls were, however, presented to the jury during the testimony of the policewoman who took the calls. We will therefore address ourselves to defendant's contention that the recordings, i. e., testimony concerning the substance of the telephone conversations, should have been suppressed.

[2] Briefly, defendant's contention is that the statements should have been suppressed because the police investigation had focused on "John Smith" and that defendant, alias Smith, was deceived or induced into making incriminating statements without being informed of certain of his constitutional rights.² It is defendant's contention that the principles enunciated in *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) and *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were applicable, and that "John Smith" should have been informed of his right to remain silent, his right to an attorney, and the other rights required by *Miranda*.

There is no merit to this contention. In *Miranda*, the Supreme Court made it clear that that decision was to govern *custodial interrogations*. The Court stated:

"Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguard, effective to secure the privilege against self-incrimination. By custodial interrogation, we

mean police calls, but merely assumes that to be the case hypothetically, inasmuch as this was apparently the decision of the jury.

2. In brief, defendant states that by advancing this argument, he in no way admits that he was the "John Smith" who made the tele-

mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.⁴

"4. This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused."

It is apparent in the instant case that this "John Smith," who circumstantially was shown to be defendant, was at the time of the incriminating telephone conversations neither in police custody nor deprived of his freedom in any way. Accordingly, we find no merit in the argument presented here.

ASSIGNMENT OF ERROR NO. 3.

Under assignment of error no. 3, defendant presents two alleged errors, the first being the denial of his motion to suppress physical evidence, specifically, a pair of gloves, and the second being the introduction of the gloves into evidence during trial. The gloves were seized during a search of defendant's mother's automobile. Legal authority for the search of the automobile was premised upon both a properly issued search warrant and upon a consent to search form signed by defendant's mother. Defendant disputes the validity of the search under each of those documents.

[3] We shall consider defendant's argument in regard to the search conducted under the authority of the search warrant. Defendant in no way disputes the validity of the warrant, but he does take issue with its execution. The warrant listed three particular things to be seized: 1) \$50.00 in cash, 2) a piggy bank, and 3) a certain

3. Defendant also cites Article I, § 5 of the Louisiana Constitution of 1974, which requires particularization of the "things to be seized." As the search warrant was issued and the search conducted on or about January 16, 1974, long before the effective date of that Constitution, its provisions are in-

pair of pants and a shirt. Defendant contends that as the gloves were not specified on the warrant, they were improperly seized in violation of the Fourth Amendment.⁵

[4] We do not find merit in this argument. Evidence obtained in the proper execution of a restricted search warrant issued on probable cause is admissible notwithstanding the fact that such evidence was not specified in the warrant. The validity of such seizure is based on the "plain view" doctrine, which allows seizure of evidence or contraband coming within the officer's view as long as he had prior justification to be in a position to have that view. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *State v. Heron*, 301 So.2d 312 (La. 1974).

[5] The gloves in the instant case were found under the front seat of the automobile which was being searched pursuant to the warrant. As any of the items detailed on the face of the warrant itself could easily have been hidden under the car seat, the officers were justified in searching that location, and when they discovered the gloves, which had been earlier described to them by the victim, the officers were legally entitled to seize them.

As we find that the gloves were properly seized during execution of the search warrant, and accordingly were admissible at trial, we need not address ourselves to defendant's alternative argument that seizure of the gloves was invalid due to an alleged defect in the consent form signed by defendant's mother and due to alleged improper execution of this consensual search.⁶

This assignment of error has no merit.

applicable. In any event we do not feel that the cited provision would be authority in support of defendant's position.

4. We note in any event that there does not appear to be merit in defendant's argument. His contention that the consent to search

ASSIGNMENT OF ERROR NO. 4.

[6] In his final assignment of error, defendant contends that the trial court erred in denying his motion in arrest of judgment. Defendant argued in that motion that La.R.S. 14:42 is unconstitutional in that its provision for a sentence of death violates the Eighth and Fourteenth Amendments to the United States Constitution. Defendant in brief elaborates upon this contention and specifically argues that the constitutional infirmity lies in the fact that the jury may return a responsive verdict of attempted aggravated rape or simple rape neither of which carries the death penalty. Defendant contends therefore that the jury has the power to render the death penalty in a discriminatory manner, all in violation of the constitutional principles expressed in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

This same argument was presented in *State v. Selman*, 300 So.2d 467 (La.1974). The Court in *Selman* stated:

"Finally, we find no substance in the argument that by permitting a jury to render responsive verdicts, there still remains in the jury the uncontrolled discretion to impose the death penalty. The responsive verdicts for aggravated rape are as follows: guilty, guilty of attempted aggravated rape, guilty of simple rape, not guilty. The reason for this argument lacking merit is that the jury has no discretion in the imposition of the death penalty for aggravated rape. If

form was invalid is based upon the fact that the form is a pre-printed one applicable to search of a house, and while the police scratched out the word house the first time it appeared in the form and substituted the word car, they failed to do so the second time the word house app

In the body of the form, the police officer described the automobile by year, make, model, color, license plate number, and motor registration number. The evidence shows that defendant's mother indicated she was consenting to a search of her automobile.

the jury finds under the facts of the case that the accused is guilty of aggravated rape, the death penalty shall be imposed. On the other hand, if the jury finds under the facts of the case that the accused is either guilty of attempted aggravated rape or simple rape, they will render a verdict of guilty for that particular crime. We must bear in mind that attempted aggravated rape and simple rape are separate and distinct crimes with separate penalty provisions for each. The fact that death is the mandatory penalty for aggravated rape but not for the responsive verdicts of attempted aggravated rape and simple rape is of no moment. The sole determining factor as to which penalty will be imposed depends upon the particular crime for which the jury finds the accused guilty, if any. Therefore, we conclude that there is no discretion in the jury for the imposition of the death penalty where the accused is found guilty of aggravated rape.

"Hence, the present death penalty in Louisiana for aggravated rape is constitutionally permissible. It does not violate the Eighth and Fourteenth Amendments to the United States Constitution."

We have additionally upheld the Louisiana death penalty for murder, as contained in La.R.S. 14:30, despite the identical contention that the possibility of responsive verdicts to the charge of first degree murder affords a jury unbridled discretion in the imposition of the death penalty. *State v. Roberts*, La., 319 So.2d 317, decision

The second argument presented is that the consent to search form only gave permission to search to the three officers who were named in the form, and that as the search was actually conducted by another officer, not one of those named in the form, the search and seizure were invalid. The evidence shows that the automobile was in police custody, and that when the officers who went to defendant's mother's house had obtained her consent to search the automobile, they relayed this information to the non-designated police officer, and he then actually conducted the search.

rendered September 5, 1975; *State v. Hull*, 277 So.2d 640 (La.1974).

These prior decisions are controlling. This assignment of error has no merit.

THE WITHERSPOON ISSUE.

While defendant's specifications of errors are limited to the four which we have previously discussed, counsel for defendant in a supplemental brief filed in this Court urges an alleged error of asserted constitutional proportions, namely, that the trial court's excusing two jurors for cause, where they allegedly did not make it unmistakably clear that they would automatically vote against the imposition of capital punishment without regard to the evidence, constituted a deprivation of due process of

law under *Witherspoon v. Illinois*, 391 U.S. 510, 83 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Defendant requests that we look at the issue, and suggests that if we do not do so, the federal courts will. He cites in this regard *Wigglesworth v. Ohio*, 393 U.S. 947, 91 S.Ct. 2264, 29 L.Ed.2d 857 (1971):

[7, 8] Our statutory procedure will not permit us to review this contention.⁵ We hasten to point out, however, that the defendant does indeed have available to him other possible remedies, such as a petition for a writ of certiorari to the United States Supreme Court, or writ of habeas corpus. We do not mean to imply that we find merit in defendant's argument that *Witherspoon* has been violated here. The state's position on this issue incidentally is a persuasive one.⁶

5. At the time defendant was tried, Article 929 of the Code of Criminal Procedure provided that the Court's review was limited to 1) formal bills of exceptions which had been submitted to and signed by the trial judge, and 2) errors discoverable by a mere inspection of the pleadings and proceedings. In addition, Article 841, C.Cr.P., expressly provided that an irregularity or error could not be waived after trial unless it was objected to at the time of its occurrence and a bill of exceptions was reserved to the adverse ruling by the trial court. Failure to reserve a bill operated as a waiver of the objection.

It is undisputed that defendant did not object during the voir dire examination or when the two jurors were excused for cause. Defendant's perfected bills of exceptions filed with the trial court did not include a bill of exceptions relative to that issue, and indeed his failure to object at the time the alleged error occurred precluded his filing such a bill. Consequently, that alleged error cannot be reviewed under Art. 929(1). Nor is the alleged error one discoverable by a mere inspection of the pleadings and proceedings. [See *State v. Crowdock*, 307 So.2d 342 (La.1975), for a discussion of the type of errors considered discoverable by mere inspection], and therefore it cannot be reviewed under Art. 929 (2).

Shortly after defendant's conviction, the Code of Criminal Procedure was amended, substituting assignment of errors for bills of exceptions. See Arts. 811, 811, and 929. As amended, Article 811 still requires an objection to be made, except to a ruling on a written motion, at the time an error or ir-

regularity occurs. Consequently, under present law we are still unable to review an asserted error such as the one presented in this case.

6. In *Witherspoon*, the Supreme Court held: "... a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

To execute this death sentence would deprive him of his life without due process of law." 391 U.S. 510, 522-23, 83 S.Ct. 1770, 1777, 20 L.Ed.2d 776.

Accordingly, the only veniremen who are to be excused are:

"those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." 391 U.S. 510, 522-23 n. 21, 83 S.Ct. 1770, 1777, 20 L.Ed.2d 776.

The state contends that the two prospective jurors who were challenged for cause were correctly excused under *Witherspoon*, and under Art. 709(2)(b), C.Cr.P., because each of the jurors stated essentially that he would automatically vote against the imposition of capital punishment without regard to any evi-

DECREE

Because we have found no merit in the four assignments of error and in view of our procedural limitation which preclude review of the issue raised in brief concerning a possible *Witherspoon* issue, we affirm conviction and sentence of the defendant.

MARCUS and BARHAM, JJ., concur.

TATE, J., concurs and assigns reasons.

DIXON, J., concurs in part and dissents in part and assigns written reasons.

TATE, Justice (concurring).

I concur in the majority opinion, except in that portion which notes as possibly "persuasive" the state's position relative to a *Witherspoon* violation. See footnote 6.

The state contends that, since the jury is no longer concerned with whether a death penalty is exacted, the defendant cannot complain of the exclusion from service of jurors with ambivalent but not fixed opinions against capital punishment. To the contrary, it seems to me, that neither the state nor the defense can, on their attitude toward the death penalty, question or exclude jurors, if we accept the state's argument that the jury has nothing whatsoever

dence that might be developed at the trial of the case.

The state's principal contention, however, is that *Witherspoon* was not applicable to the jury selection in defendant's trial. The state argues that the holding in *Witherspoon* was expressly limited to the discretionary sentencing function of a capital case jury. In such a situation the Supreme Court held that it was a violation of due process to execute a death sentence imposed by a jury from which those citizens who had general objections to the death penalty had been excluded. While the argument was presented before it, that Court in *Witherspoon* refused to find that a jury devoid of individuals who had misgivings about the imposition of capital punishment was unable to make a just determination of guilt or innocence.

to do with the imposition of the death penalty.

The state's suggestion seems to me to be unrealistic and untenable that the jury's only concern is to select from the responsive verdicts, without regard that one of them means that the accused will be executed.

The artificial and unrealistic basis of this argument is shown by the care the state used to exclude from service on this jury those veniremen with doubts or conscientious scruples against imposition of the death penalty. If indeed the veniremen have no concern with the penalty their verdict will cause the accused, then the state should be indifferent to the private attitude of veniremen against the death penalty.

Logically also, it follows, questioning of veniremen on the subject by either the state or the accused is irrelevant. Likewise, the excusal for cause of a juror because of his views against capital punishment would be reversible error, as depriving an accused of the services of a cross-section of the population on the jury without legal cause.

I do not believe the state will accept these logical consequences of its argument that a *Witherspoon* violation is immaterial because of the jury's alleged lack of function with regard to imposition of a penalty.

The state points out that by virtue of amendments to the Criminal Code and the Code of Criminal Procedure, made after rendition of *Furman v. Georgia*, *supra*, the jury before which the defendant was tried did not have the discretion to impose either a death sentence or life imprisonment. (See La.R.S. 14:42, mandating the death sentence for aggravated rape; Art. 814, C.C.P., limiting an aggravated rape guilty verdict to the single finding, guilty as charged, although also responsive are the verdicts guilty of attempted aggravated rape, guilty of simple rape, or not guilty; and Art. 817, C.C.P., providing that "any qualification of or addition to a verdict of guilty . . . is without effect upon the finding.") Their sole function was to make a finding of guilt or innocence. Consequently, the state argues that *Witherspoon* was inapplicable.

Fundamentally, I believe the jury is actually and by law charged with a great responsibility as to the range of penalty imposed by its verdict of guilty on one of the responsive verdicts. When one verdict of the jury means death for the accused and another means life, we reason from formula and abstraction and not from human reality and responsibility if we say that the jury is not concerned with the penalty to be imposed as a result of the verdict it agrees on.

DIXON, Justice (concurring).

I concur in the opinion, with this exception: I respectfully dissent as to Assignment of Error No. 4, being of the opinion that the death penalty in Louisiana is violative of the *Furman* decision in that the jury possesses the uncontrolled discretion to return verdicts of guilty of lesser included offenses which do not carry the death penalty.



STATE of Louisiana

v.

Willie E. CALLIHAN.

No. 56247.

Supreme Court of Louisiana.

Oct. 1, 1975.

Rehearing Denied Oct. 31, 1975.

Defendant was convicted in the 21st Judicial District Court, Parish of Tangipahoa, Warren W. Conish, J., of manslaughter, and he brought an out-of-time appeal coupled with an application for a writ of habeas corpus. The Supreme Court, Dixon, J., held that where the defendant had been taken into custody and questioned

with regard to the alleged offense without having been given Miranda warnings, and where defendant had volunteered to make a statement, the fact that a lawyer was called at such time to advise the defendant that he did not have to make any statements could not serve to render the statement made at that time admissible.

Reversed and remanded.

Sanders, C. J., dissented and filed an opinion and was of the opinion that a rehearing should be granted.

Summers and Marcus, JJ., dissented and were both of the opinion that a rehearing should be granted.

1. Criminal Law C-412.2(3)

An after-the-fact attempt to ritualize the safeguards of Miranda cannot be used to deprive the defendant of the very rights the Miranda decision sought to protect.

2. Criminal Law C-412.2(3)

Where defendant in murder prosecution, who had not been advised of his right to remain silent or to have an attorney present during questioning, was taken into custody by officers on June 23, 1976 after questioning in his home, was brought to jail and questioned further by officers about alleged offense, and subsequently told officers that he would make statement, fact that a lawyer was called at this point to advise the defendant that he did not have to make any statements could not serve to render statement made by defendant at that time admissible.

3. Criminal Law C-414

The burden is on the State to prove beyond a reasonable doubt that the legal requirements for the voluntariness of statements made during custodial interrogation were complied with.

1. Criminal Law C-412.2(3)

One of legal requirements for voluntariness of statements made during custodial

CRIMES AND OFFENSES--FORCIBLE RAPE

" ACT NO. 333

HOUSE BILL NO. 617

An Act to amend Title 14 of the Louisiana Revised Statutes of 1950, by adding thereto a new Section to be designated as Section 43.1, to provide for the establishment of the crime of forcible rape; to provide the penalty therefor; and to otherwise provide with respect thereto.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 43.1 of Title 14 of the Louisiana Revised Statutes of 1950 is hereby enacted to read as follows:

--§ 43.1 Forcible rape

Forcible rape is sexual intercourse without the lawful consent of the female where she is prevented from resisting the act by force or threats of physical violence wherein the victim reasonably believes her resistance to be useless.

Whoever commits the crime of forcible rape shall be imprisoned at hard labor for not less than one nor more than twenty years.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.⁹

Approved July 17, 1975.

**CRIMES AND OFFENSES—RAPE AND
CRIME AGAINST NATURE**

ACT NO. 612

SENATE BILL NO. 400

An Act to amend and reenact Sections 41, 42, 43 and 89 of Title 14 of the Louisiana Revised Statutes of 1950, and to amend said Title by adding thereto a new Section to be designated as R.S. 14:41.1, to provide that the crime of rape be defined on both heterosexual and homosexual terms; to provide that the crimes of simple rape and aggravated rape apply to both heterosexual and homosexual intercourse; and to provide that the definition of crime against nature exclude anal sexual intercourse when done under circumstances described in R.S. 14:41, 14:41.1, 14:42 or 14:43.

Be it enacted by the Legislature of Louisiana:

Section 1. Sections 41, 42, 43 and 89 of Title 14 of the Louisiana Revised Statutes of 1950 are hereby amended and reenacted, and Section 41.1 of said Title 14 is hereby enacted to read as follows:

§ 41. Rape; heterosexual; defined

Heterosexual rape is the act of sexual intercourse with a female person not the wife of, or judicially separated from bed and board from, the offender, committed without her lawful consent. Emission is not necessary; and any sexual penetration, vaginal or anal, however slight, is sufficient to complete the crime.

§ 41.1 Rape; homosexual; defined

Homosexual rape is the act of anal sexual intercourse with a male person committed without his consent. Emission is not necessary, and any anal sexual penetration, however slight, is sufficient to complete the crime.

§ 42. Aggravated rape

Aggravated rape is a rape, heterosexual or homosexual, committed where the sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

- (1) Where the victim resists the act to the utmost, but whose resistance is overcome by force;
- (2) Where the victim is prevented from resisting the act by threats of great and immediate bodily harm, accompanied by apparent power of execution;
- (3) Where the victim is under the age of twelve years. Lack of knowledge of the victim's age shall not be a defense.

Whoever commits the crime of aggravated rape shall be punished by death.

§ 43. Simple rape

Simple rape is a rape, heterosexual or homosexual, committed where the sexual intercourse is deemed to be without the lawful consent of the victim because it is committed under any one or more of the following circumstances:

- (1) Where the victim is incapable of resisting or of understanding the nature of the act by reason of stupor or abnormal condition of the mind produced by an intoxicating, narcotic, or anesthetic agent, administered by or with the privity of the offender; or when victim has such incapacity,

by reason of a stupor or abnormal condition of mind from any cause, and the offender knew or should have known of the victim's incapacity;

(2) Where the victim is incapable, through unsoundness of mind, whether temporary or permanent, of understanding the nature of the act; and the offender knew or should have known of the victim's incapacity.

(3) Where, in a case of heterosexual rape, the female person submits under the belief that the person committing the act is her husband and such belief is intentionally induced by any artifice, pretense, or concealment practiced by the offender.

Whoever commits the crime of simple rape shall be imprisoned at hard labor for not less than one nor more than twenty years.

§ 89. Crime against nature

Crime against nature is the unnatural carnal copulation by a human being with another of the same sex or opposite sex or with an animal, except that anal sexual intercourse between two human beings shall not be deemed as a crime against nature when done under any of the circumstances described in R.S. 14:41, 14:41.1, 14:42, or 14:43. Emission is not necessary; and, when committed by a human being with another, the use of the genital organ of one of the offenders of whatever sex is sufficient to constitute the crime.

Whoever commits the crime against nature shall be fined not more than two thousand dollars, or imprisoned, with or without hard labor, for not more than five years, or both.

Section 2. If any provision or item of this Act or the application thereof is held invalid, such invalidity shall not affect other provisions, items or applications of this Act which can be given effect without the invalid provisions, items or applications, and to this end the provisions of this Act are hereby declared severable.

Section 3. All laws or parts of laws in conflict herewith are hereby repealed.

Approved July 17, 1975.